Supreme Court, U.S.
MOTION FILED
JAN 16 2009
William K. Suter,
Clerk

117

(3)

No. 08-782

IN THE

Supreme Court of the United States

THE CALIFORNIA SPEEDWAY CORPORATION,

Petitioner,

v.

ROBERT MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF SPEEDWAY SONOMA, LLC FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EDWARD G. GUEDES
Counsel of Record
JULISSA RODRIGUEZ
ROBERT S. FINE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Counsel for Amicus Curiae

220528

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Pursuant to U.S. Sup. Ct. R. 37.2(b), Speedway Sonoma, LLC ("Speedway Sonoma"), respectfully requests leave to file a brief as *amicus curiae* in support of petitioner, the California Speedway Corporation. A copy of the proposed brief is attached.

As more fully set forth in the brief, Speedway Sonoma is a Delaware limited liability company, which operates Infineon Raceway, a professional racetrack in Sonoma, California, the sixth-largest market for motorsports in the United States. The racetrack opened in 1968 and, since 1996 when Speedway Sonoma acquired it, has undergone substantial renovations costing in excess of $80 million.

Speedway Sonoma seeks to file this brief because the Department of Justice (DOJ) has imposed new regulatory requirements, to which Infineon Raceway is subject, in violation of the rulemaking mechanism established by the Administrative Procedure Act (APA). Compliance with the APA's public notice and comment requirements, which the DOJ bypassed altogether, is imperative to provide those subject to the DOJ's regulations with an opportunity to comment on proposed modifications that will affect their legal obligations, and thereby allow for a clear understanding of the law and ensure stability in regulatory enforcement.

Speedway Sonoma sought and obtained written consent to file an *amicus curiae* brief from petitioner. Petitioner's consent has been submitted herewith. On January 6, 2009, Sacramento counsel for Speedway Sonoma had a telephonic conversation with Russell Handy, an attorney affiliated with the Center for Disability Access ("Center") and counsel of record for

the respondent in the proceedings below, and obtained consent for Speedway Motorsports, Inc. ("SMI," the "parent" of Speedway Sonoma), and related entities, to file an *amicus curiae* brief in support of the petitioner. Counsel confirmed the telephonic conversation with correspondence that same day. The correspondence between Sacramento counsel and counsel for respondent has been submitted herewith.

Three days later, on January 9, 2009, Sacramento counsel sent a follow-up letter to Mr. Handy requesting the required written consent and reminding him of his prior verbal consent. No response was received.

On January 12, 2009, Sacramento counsel again wrote to Mr. Handy seeking the written confirmation of the earlier consent and clarifying that Speedway Sonoma, an affiliate of SMI, would be the lead *amicus*. Once again, no response was received.

On January 15, 2009, at 11:09 a.m., P.S.T., the afternoon before the *amicus* brief would be due, Mark Potter, another attorney affiliated with the Center, wrote to Sacramento counsel for Speedway Sonoma indicating that he could not "agree to give . . . permission to file" the *amicus* brief. Mr. Potter acknowledged that consent had previously been given, but mistakenly so, and then expressed his "deep[] regret any waste of resources that this misunderstanding may have caused you or your client." The brief, of course, had already been fully drafted in reliance on the earlier verbal consent and 10 days of silence in the face of repeated confirming correspondence, and was ready to be filed.

Speedway Sonoma's brief in support of the petitioner offers the Court valuable information pertaining to the scope of the impact of the Ninth Circuit's decision below and focuses primarily on broader concerns regarding the DOJ's failure to abide by the public notice and comment procedures of the APA.

Wherefore, Speedway Sonoma, LLC, respectfully requests that the Court grant this motion for leave to file an *amicus curiae* brief in support of the petitioner and accept the accompanying brief.

Respectfully submitted,

EDWARD G. GUEDES
Counsel of Record
JULISSA RODRIGUEZ
ROBERT S. FINE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
STATEMENT OF THE FACTS	4
ARGUMENT	7
ALLOWING THE DOJ TO ADOPT NEW METHODS OF IMPLEMENTING ADA REGULATIONS WITHOUT COMPLYING WITH THE APA'S PUBLIC NOTICE AND COMMENT REQUIREMENTS DEFEATS THE SALUTARY PURPOSE OF THE APA WHILE DESTABILIZING THE LAW.	7
A. The Third Circuit's analysis in *Caruso* demonstrates that the DOJ entirely abdicated its rulemaking function to the Access Board when the latter adopted the ADAAG in 1991.	7
B. The APA's public notice and comment procedures serve the dual, salutary purposes of constraining agency power, thus preserving the	

Contents

Page

separation of powers, and maximizing the efficacy of rulemaking by enlisting the assistance of those governed and sufficiently apprising them of their obligations. 11

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Ala. Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) 19

Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987) 12

Caruso v. Blockbuster-Sony Music Entm't Ctr., 968 F. Supp. 210 (D.N.J. 1997) 10, 17

Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730 (3d Cir. 1999) 2, 9, 10, 17

Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464 (D.C. Cir. 1980) 19

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) .. 13

Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987) 12

Garrison v. Baker Hughes Oilfield Ops., Inc., 287 F.3d 955 (10th Cir. 2002) 13

Grayned v. City of Rockford, 408 U.S. 104 (1972) 18

Cited Authorities

	Page
Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir.), *cert. denied*, 531 U.S. 944 (2000)	17
Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986)	12
Miller v. California Speedway Corp., 536 F.3d 1020 (9th Cir. 2008)	2, 8, 9
Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951 (9th Cir. 1988)	12
Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998)	17
Pickus v. U.S. Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974)	12
Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997)	13
Sprint Corp. v. FCC, 315 F.3d 369 (D.C. Cir. 2003)	11
Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)	10
U.S. v. AMC Entm't, Inc., 549 F.3d 760 (9th Cir. 2008)	17

Cited Authorities

	Page
U.S. v. Hoyts Cinemas Corp., 380 F.3d 558 (1st Cir. 2004)	17
U.S. v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989)	12
United Technologies Corp. v. U.S. EPA, 821 F.2d 714 (D.C. Cir. 1987)	13
W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987)	12
CODES, REGULATIONS AND RULES	
5 U.S.C. § 553	11
42 U.S.C. § 12182(a)	13
42 U.S.C. § 12183(a)(1)	13
42 U.S.C. § 12186(b)	7
42 U.S.C. § 12204(a)	7
28 C.F.R § 36.403	1
28 C.F.R pt. 36, App. A, § 4.33.3	3, 4, 10, 17
28 C.F.R pt. 36, App. B, Preamble	9, 11
56 Fed. Reg. 7478 (1991)	8

Page

56 Fed. Reg. 35,408 (1991) 8

56 Fed. Reg. 35,440 (1991) 8

64 Fed. Reg. 62,248 (1999) 8

64 Fed. Reg. 62,501 (1999) 8

69 Fed. Reg. 44,083 (2004) 8

Sup. Ct. R. 32.3 7

SECONDARY AUTHORITIES

Department of Justice, Americans With Disabilities Act Title III Technical Assistance Manual § III-7.5180 (1994 Supp.) ..... *passim*

1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10 (1994) .. 10

Robert A. Anthony, INTERPRETIVE RULES, POLICY STATEMENTS, GUIDANCES, MANUALS, AND THE LIKE – SHOULD FEDERAL AGENCIES USE THEM TO BIND THE PUBLIC?, 41 Duke L.J. 1311 (1992) 14, 15, 18

Michael Asimow, NONLEGISLATIVE RULEMAKING AND REGULATORY REFORM, 1985 Duke L.J. 381 (1985) 17

Cited Authorities

Page

ARCA, *http://www.arcaracing.com* (last visited Jan. 14, 2009) 5

ESPN, *http://www.sports.espn.go.com/mlb/attendance* (last visited Jan. 14, 2009) 5

ESPN, *http://www.sports.espn.go.com/nfl/attendance* (last visited Jan. 14, 2009) 5

Indy Car Series, *http://www.indycar.com* (last visited Jan. 14, 2009) 5

NASCAR, *http://www.nascar.com/guides/about/nascar* (last visited Jan. 14, 2009) 5

NASCAR, *http://www.nascar.com/races/tracks* (last visited Jan. 14, 2009) 4

United States Auto Club, *http://www.usacracing.com* (last visited Jan. 14, 2009) 5

INTEREST OF AMICUS CURIAE[1]

Speedway Sonoma, LLC (Speedway Sonoma) is a Delaware limited liability company, which operates Infineon Raceway, a professional racetrack in Sonoma, California, the sixth-largest market for motorsports in the United States. The racetrack opened in 1968 and, since 1996 when Speedway Sonoma acquired it, has undergone substantial renovations[2] costing in excess of $80 million.[3] The racing facility is situated on 1,597 acres and includes a 2.52-mile, twelve-turn road course, a one-quarter mile modern drag strip, and an expansive industrial park; seating capacity exceeds 47,000 patrons per event. In 2007, Infineon Raceway hosted seven major racing events, or twenty racing days, including the NASCAR[4] Sprint Cup Series, National Hot Rod

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief; Respondent has not. The parties have been given at least 10 days notice of *amicus'* intention to file. Petitioner's consent has been submitted herewith.

2 Or "alterations," as defined in Title III regulations, 28 C.F.R § 36.403 and Section 3.5 of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").

3 The "alterations" provisions of the Title III regulations and ADAAG took effect on January 26, 1992.

4 The National Association for Stock Car Auto Racing (NASCAR) is the largest sanctioning body of stock car automobile races in the United States.

POWERade Drag Racing, the Indy Car Series, and the AMA Superbike Series. The raceway is host to one of only five NASCAR races each year that are run on road courses. In 2007, more than 328,000 fans attended motorsports events held at Infineon Raceway.

Speedway Sonoma submits this brief as *amicus curiae* in support of the position of petitioner, The California Speedway Corporation (California Speedway), because the Department of Justice (DOJ) has imposed new regulatory requirements, to which Infineon Raceway is subject, in violation of the rulemaking mechanism established by the Administrative Procedure Act (APA). Compliance with the APA's public notice and comment requirements, which the Department of Justice bypassed altogether, is imperative to provide those subject to the DOJ's regulations with an opportunity to comment on proposed modifications that will significantly affect their legal obligations, and thereby allow for a clear understanding of the law and ensure stability in regulatory enforcement.

SUMMARY OF ARGUMENT

The indisputable conflict that exists between the Ninth Circuit's decision below, *Miller v. California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), and the Third Circuit's decision in *Caruso v. Blockbuster-Sony Music Entertainment Center at the Waterfront*, 193 F.3d 730 (3d Cir. 1999), demonstrates precisely why the DOJ should not be permitted to adopt *sub silentio* new regulatory requirements ostensibly mandating how comparable lines of sight for disabled patrons should be implemented in sports facilities without complying

with the public notice and comment requirements of the APA. As the Third Circuit correctly observed, the DOJ abdicated its rule-making function with respect to Title III of the Americans with Disabilities Act (ADA) *entirely* to the Architectural and Transportation Barriers Compliance Board ("Access Board") in 1991 and adopted wholesale not only the Access Board's final rule, but also the *process* by which those rules were derived, including extensive changes made in response to public comments directed to, among other issues, the need for lines of sight for disabled patrons over standing spectators.

At the time of its adoption of the ADAAG in 1991, the Access Board unequivocally communicated that the ADAAG provision pertaining to comparable lines of sight – 28 C.F.R. pt. 36, App. A, § 4.33.3 – was not intended to address the question of whether lines of sight over standing spectators would be required and that such issue would be considered and addressed in regulations to be adopted in the future in connection with recreational facilities. Inasmuch as the DOJ adopted the ADAAG without qualification or clarification, racetrack owners and operators, along with virtually every other stadium, arena, theatre or major auditorium owner, were entitled to rely upon the Access Board's interpretation in constructing or renovating their sizeable facilities.

One of the principal purposes of the rulemaking mechanism set forth in the Administrative Procedures Act ("APA") is to ensure stability in regulatory enforcement and instill confidence in the public as to their legal obligations. Courts throughout the country have repeatedly acknowledged that the ADA, generally,

and section 4.33.3, specifically, are fraught with ambiguities that have led those same courts to reach at times conflicting interpretations. This, in turn, has resulted in needless litigation and the expenditure of hundreds of millions of dollars in facility construction and renovation based on supposition as to what the law requires. The DOJ's attempt to impose new construction and alteration requirements through any mechanism other than the APA's public notice and comment procedures only serves to exacerbate the instability in the law.

STATEMENT OF THE FACTS

Speedway Sonoma adopts the statement of the facts in petitioner's brief and provides the following additional factual information to assist the Court in its evaluation of the pending petition.

NASCAR has grown to become the second-most popular professional sport in the United States in terms of television ratings, ranking behind only the National Football League.[5] The largest NASCAR tracks can accommodate upwards of 250,000 people in the stands and infield, far larger than any non-motorsports venue in North America.[6] In fact, NASCAR holds 17 of the 20 highest attended sporting events in the country, and sanctions more than 1,200 events at 100 racetracks in

[5] *See* NASCAR, http://www.nascar.com/guides/about/nascar (last visited Jan. 14, 2009). Unless otherwise indicated, all web sites were last visited January 14, 2009.

[6] *See* NASCAR, http://www.nascar.com/races/tracks.

30 U.S. states, Canada and Mexico, many of which are broadcast to 150 countries in more than 30 languages.[7] NASCAR is but one of a number of racing organizations operating in the United States, including The United States Automobile Club,[8] the Automobile Racing Club of America[9] and the Indy Racing League,[10] just to name a few. Collectively, these organizations sponsor thousands of events at hundreds of facilities across the country, attended by tens of millions of spectators annually.

In addition to racing organizations, a host of other professional sports organizations sponsor events taking place in large stadiums or arenas, including Major League Baseball, the National Football League, the National Basketball Association, the National Hockey Association, the United States Tennis Association and United States Soccer. Major League Baseball, alone, operates for six months of the year in 30 stadiums with a combined annual attendance in 2008 of approximately 78,600,000 spectators.[11] National Football League games required another 27 stadiums and were attended by approximately 32,400,000 patrons.[12] Include the

---

[7] *See* NASCAR, http://www.nascar.com/guides/about/nascar.

[8] *See* United States Auto Club, http://www.usacracing.com.

[9] *See* ARCA, http://www.arcaracing.com.

[10] *See* Indy Car Series, http://www.indycar.com.

[11] *See* ESPN, http://sports.espn.go.com/mlb/attendance.

[12] *See* ESPN, http://sports.espn.go.com/nfl/attendance.

remaining professional sporting events, plus all semi-professional and university level games, as well as concerts and other events held in these same facilities, and it becomes immediately evident that the ADA regulations at issue affect thousands of separate events, held at hundreds of facilities, attended by hundreds of millions of spectators each year.

Construction of these facilities is a complex endeavor that requires several years of advance planning and sophisticated engineering. The cost of constructing these facilities often easily exceeds $100 million, taking into account their size, enormous patronage and hundreds (if not thousands) of applicable local, state and federal regulatory requirements. Their financial feasibility and viability are often dependent on projected revenues. It is, therefore, imperative that, whatever federal regulatory requirements apply, they be clear and compliant with the APA. Modifying facilities to accommodate mandated post-construction changes is *ipso facto* more expensive than incorporating those requirements into original construction, and can have devastating impacts on loss of ticket revenue for facilities of this size.[13] The consequences of the DOJ's

---

[13] Kevin McGuire, president of McGuire Associates Inc., an accessibility consultancy firm with considerable experience in rendering advice as to the renovation of stadiums and arenas to achieve ADA compliance, has indicated that such after-the-fact alteration of existing sports facilities inevitably involve significant financial burdens. Specifically, modifications to accommodate lines of site over standing spectators at four professional sports stadiums located in Philadelphia, Boston, Miami, Florida and Portland, Oregon cost between $250,000 (Cont'd)

conduct at issue here most certainly extend well beyond a solitary racetrack in California.

ARGUMENT

ALLOWING THE DOJ TO ADOPT NEW METHODS OF IMPLEMENTING ADA REGULATIONS WITHOUT COMPLYING WITH THE APA'S PUBLIC NOTICE AND COMMENT REQUIREMENTS DEFEATS THE SALUTARY PURPOSE OF THE APA WHILE DESTABILIZING THE LAW.

A. The Third Circuit's analysis in *Caruso* demonstrates that the DOJ entirely abdicated its rulemaking function to the Access Board when the latter adopted the ADAAG in 1991.

Although it had been directed by Congress to adopt implementing regulations for Title III of the ADA within one year of the statute's enactment, 42 U.S.C. § 12186(b) (2006), the DOJ elected to rely on the Access Board – which had been separately directed by Congress to enact minimum guidelines for Title III, 42 U.S.C. § 12204(a) (2006) – to devise the pertinent regulations. In its February 22, 1991 public notice, the DOJ indicated

---

(Cont'd)
and more than $1 million in construction costs. In addition, the alterations have resulted and will continue to result in the loss of ticket revenue for 50 to 300 seats per event, per year. Under separate cover, Speedway Sonoma is filing a letter with the Clerk of the Court, pursuant to U.S. Sup. Ct. R. 32.3, requesting leave to file Mr. McGuire's affidavit attesting to this information.

that it intended to adopt the Access Board's proposed guidelines along "with any amendments made by the [Access Board] during the rulemaking process." 56 Fed. Reg. 7478-79 (1991). It further directed the public to submit "any comments" regarding the proposed guidelines directly to the Access Board. *Id.* at 7479.

Ultimately, the Access Board adopted the ADAAG, 56 Fed. Reg. 35,408 (1991), and provided an explicit commentary on the scope of the rules. As the Ninth Circuit correctly observed below, the Access Board addressed the problem of "lines of sight over standing spectators in sports arenas and other similar assembly areas" and noted that "many commenters also recommended that lines of sight should be provided over standing spectators." *Miller*, 536 F.3d at 1025 (citing 56 Fed. Reg. 35,440 (1991)). The Access Board, however, with respect to this issue, had also clearly stated: "[T]he issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities. . . ." 56 Fed. Reg. 35,440 (1991). Those guidelines eventually were adopted by the Access Board, after public notice and comment,[14] in July 2004, 69 Fed. Reg. 44,083 (2004), although to this day, they have *not* been adopted by the DOJ. *Miller*, 536 F.3d at 1027 n.1.

In concluding that the DOJ's 1994 supplement to the 1993 technical assistance manual (collectively, the "1994 TAM") – which purported to impose line of sight

[14] The Access Board first gave notice of its intent to adopt guidelines pertaining to the standing spectator issue in November 1999. 64 Fed. Reg. 62,248, 62,501-02 (1999). Almost five years later, the final guidelines were adopted by the Board.

requirements over standing spectators[15] – was not binding, the *Caruso* court noted five key factors that strongly supported its conclusion: (1) the DOJ referred all comments on the subject of standing spectators to the Access Board; (2) the DOJ relied upon the Access Board to make changes to the guidelines based on the public comments received; (3) the Access Board actually changed the language of section 4.33.3 in response to those comments and explained the change in the commentary; (4) the DOJ was a "member of the [Access] Board" and "participated actively . . . in the preparation of both the proposed and final versions of the [guidelines]"; and (5) the DOJ's own commentary noted that the final guidelines promulgated by the Access Board adequately addressed all comments. *Caruso*, 193 F.3d at 736. These factors go to the very heart of the APA's vital concern for a transparent rulemaking process. The DOJ, itself, noted these same facts in the statement it issued when it adopted the ADAAG as its own. 28 C.F.R. pt. 36, App. B, at 741-42. Nowhere did the DOJ affirmatively distance itself from or clarify the Access Board's commentary with respect to the limited scope of the ADAAG as to lines of sight.

At the heart of the five factors noted by the *Caruso* court arguably lies a concern for protecting the public notice and comment procedures of the APA. Hence, the Third Circuit observed that "[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to

---

[15] The 1993 technical assistance manual was actually silent as to the issue of lines of sight over standing spectators. *Miller*, 536 F.3d at 1026.

mean something other than its original meaning." *Caruso*, 193 F.3d at 737 (quoting 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10 at 283 (1994)). The district court had similarly expressed the APA concern: "When the 'legislative history' of an administrative regulation evinces an intent not to cover a certain subject matter, the notice-and-comment requirements of the APA cannot be evaded merely by interpreting an existing regulation to cover subject matter consciously omitted from its scope." *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 968 F. Supp. 210, 216 (D.N.J. 1997).

Relying on this Court's holding in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), the Third Circuit refused to give any deference to the 1994 TAM finding that a contrary interpretation – namely, that the ADAAG did not encompass lines of sight over standing spectators – was "compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso*, 193 F.3d at 736-37 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512).

While the Third Circuit did not note this, the DOJ's 1994 TAM "implementation" of section 4.33.3 also *conflicted* with its earlier expressed intent to strive towards a unified set of regulations governing the ADA. In its preamble to adopting the ADAAG in 1991, the DOJ responded to commenters' concerns about harmonizing the various codes and sets of regulations that might affect ADA implementation. The DOJ stated:

> A single accessibility standard, or consistent accessibility standards, that can be used for

> ADA purposes and that can be incorporated or referenced by State and local governments, would help to ensure that the ADA requirements are routinely implemented at the design stage. The Department plans to work toward this goal. The Department, however, must comply with the requirements of the ADA . . . and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

28 C.F.R. pt. 36, App. B, at 724. Allowing deference to the 1994 TAM implementation of section 4.33.3 would result in a standard that is at odds with the ADAAG, certainly insofar as the Access Board adopted them in 1991 (and as they remained until 2004). Such inconsistent standards would be contrary to the DOJ's explicitly stated "goal" of working toward "a single accessibility standard."

B. The APA's public notice and comment procedures serve the dual, salutary purposes of constraining agency power, thus preserving the separation of powers, and maximizing the efficacy of rulemaking by enlisting the assistance of those governed and sufficiently apprising them of their obligations.

The APA's public notice and comment requirements – set forth at 5 U.S.C. § 553 – "improve[] the quality of agency rulemaking by exposing regulations to diverse public comment, ensure[] fairness to affected parties, and provide[] a well-developed record that enhances the quality of judicial review." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citation and internal quotation

marks omitted). Congress intended in enacting these requirements that "the interested public should have an opportunity to participate, and the agency should be fully informed, before rules having such a substantial impact are promulgated." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974). The importance of these requirements has led the courts to construe any exemptions from their scope very narrowly. *U.S. v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive.") (citations omitted).

While courts have at times struggled with the distinction between a legislative rule, which must comply with the public notice and comment requirements of the APA, and an interpretive rule, which need not, a general consensus has developed that a legislative rule is one that "imposes any rights and obligations," *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); "modifies existing rights, law, or policy," *W.C. v. Bowen*, 807 F.2d 1502, 1504 (9th Cir. 1987); "*effect*[s] a change in existing law or policy," *Mt. Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988) (quoting *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986) (original emphasis)); or "substantially alter[s] the rights or interests of regulated" parties, *Am. Hosp. Ass'n*, 834 F.2d at 1041. This Court, as well, has observed that a "substantive rule" or "legislative-type rule" is one "affecting individual rights and

obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (citation omitted).[16]

At least one commentator, however, has noted that what these courts have struggled with in differentiating between types of rules is founded largely on a fundamental concern about the nature of agency power

---

[16] Perhaps more germane to the issues here, the D.C. Circuit has held:

> [I]f the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's *power to exercise its judgment as to how best to implement a general statutory mandate*, the rule is likely a legislative one.

United Technologies Corp. v. U.S. EPA, 821 F.2d 714, 719-20 (D.C. Cir. 1987) (emphasis added). Given that the 1994 TAM amounts to the DOJ's exercise of its judgment as to how best to implement the ADA standards prohibiting discrimination and mandating accessibility – 42 U.S.C. §§ 12182(a), 12183(a)(1) – as well as the section 4.33.3 requirement that "lines of sight comparable to those for members of the general public" be provided, it is difficult to understand the Ninth Circuit's conclusion that the 1994 TAM was not legislative or substantive, especially when considered in the context of the earlier, explicit statement by the Access Board that the ADAAG did not encompass lines of sight over standing spectators. This conundrum grows exponentially when one considers that the Equal Employment Opportunity Commission's ADA technical assistance manual is *not* legally binding. *See, e.g., Garrison v. Baker Hughes Oilfield Ops., Inc.*, 287 F.3d 955, 960 n.3 (10th Cir. 2002); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997).

and democratic values involving the separation of powers:

> These cases reflect a realization that the agency should not be able to fasten its will upon the affected public through any means it pleases. It may not tell people what they can and cannot do except through procedures that Congress by delegation has empowered them to use for making law. It may not enforce or apply a nonlegislative policy document in just the same way it may enforce or apply a legislative rule. Especially in view of the important values served by legislative rulemaking – enrichment of the agency's information and enhancement of the rule's acceptability, flowing from the public's opportunity to present facts and views – can it credibly be argued that unilaterally issued guidances or memoranda can possess the same force? Congress in the APA has provided that they cannot.

Robert A. Anthony, INTERPRETIVE RULES, POLICY STATEMENTS, GUIDANCES, MANUALS, AND THE LIKE – SHOULD FEDERAL AGENCIES USE THEM TO BIND THE PUBLIC?, 41 Duke L.J. 1311, 1356 (1992) (hereafter, "*Interpretive Rules*") (footnotes omitted). Professor Anthony goes on:

> Values served by the legislative rulemaking procedures are large ones. Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is

> about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed the procedures laid down by Congress for establishing rules with the binding force of law. The agency's accountability for its rules is deepened by the court-made requirement of a reasoned explanation based upon a substantial rulemaking record.

Id. at 1373-74 (footnotes omitted). These sentiments have been echoed by other administrative law scholars:

> The rulemaking procedures of the APA have been widely acclaimed as a brilliant political innovation. The notice and comment procedure, together with hard-look judicial review, addresses our uneasiness with broad legislative delegations to administrative agencies and with the tenuous nature of the

other legislative and judicial checks on agency behavior.

The APA notice and comment procedure infuses the rulemaking process with significant elements of openness, accountability, and legitimacy. Public participation promotes fundamental democratic values by enhancing the responsiveness of agencies to the interest groups affected by regulation. It opens the process to groups and individuals with discordant points of view who might otherwise not have been heard during an agency's routine process of consultation with the public. In short, through advance notice and comment, every constituency has an opportunity to participate in a meaningful manner in making the laws that will affect it.

The requirement that agencies invite and give consideration to public comments broadens an agency's perspective, which otherwise might not extend beyond the views of the staff or the client groups with whom the staff regularly consults. . . . A rule is likely to be a better product if its drafters must consider seriously alternatives that they might have overlooked or take account of practical problems that otherwise would crop up only after a rule goes into effect. In addition, an agency may receive more cooperation and less obstruction from regulated interests that have had a hand in shaping the rules within

> which they must function. Finally, by generating a record of public comment and agency response, the notice and comment system facilitates pre-enforcement hard-look judicial review, an important check on factually unsupported or arbitrary regulation.

Michael Asimow, NONLEGISLATIVE RULEMAKING AND REGULATORY REFORM, 1985 Duke L.J. 381, 402-03 (1985) (footnotes omitted).

When the particular substantive rules in question have impacts on individuals and businesses expending hundreds of millions of dollars to construct or renovate dozens of facilities that will annually serve hundreds of millions of patrons and are expected to comply with inherently ambiguous statutory and regulatory standards governing accessibility,[17] it seems a justifiable

---

[17] The Ninth Circuit below agreed in one critical respect not only with the D.C. Circuit's decision in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998), but also with *Caruso* and just about every other court that has examined the issue: all these courts have concluded that the pertinent standards are ambiguous. *E.g.*, *U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 573 (1st Cir. 2004); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir.), *cert. denied*, 531 U.S. 944 (2000); *Caruso*, 193 F.3d at 733; *Paralyzed Veterans of Am.*, 117 F.3d at 583; *Caruso*, 968 F. Supp. at 216. In fact, most recently, the Ninth Circuit described section 4.33.3 and its phrase "lines of sight comparable" as an "opaque regulation" lacking a "concrete meaning" and noted that the Access Board and DOJ had "failed to provide clear direction as to the precise meaning. . . ." *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760, 764 (9th Cir. 2008). It posited, "Examining the conflicting (Cont'd)

minimum expectation of those individuals and businesses that the rules in question will be adopted in strict conformity with APA requirements and with maximum input from the public. As Professor Anthony observed:

> Ordinary citizens or even ordinary lawyers should not have to puzzle out the particulars of the agency's authority or its observance of procedural requirements. If the agency expects to apply its document in a binding way, it should be willing to declare that the rule is a legislative one, and to back up that claim with a showing of the specific authority and procedures it has observed. If these simple declarations were required, the public and the courts could know that documents issued without them were nonlegislative, and treat them accordingly.

Interpretive Rules, 41 Duke L.J. at 1378 (footnotes omitted). No less an astute observer of the law than Judge Bazelon cautioned against this surreptitious enactment of binding law without public notice or comment nearly 30 years ago:

> "[A]lthough [the announcement] serves as an interpretation of existing law, it also

(Cont'd)
decisions reached by various courts, . . . it is clear that the text of § 4.33.3 did not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited' – let alone those of 'ordinary intelligence.' " *Id.* at 768 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

> effectively enunciates a new requirement heretofore nonexistent for compliance with the law. . . . If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era."

Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464, 471-72 (D.C. Cir. 1980) (Bazelon, J., concurring); *see also Ala. Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to know the rules by which the game will be played.") (citation and internal quotation marks omitted).

The 1994 TAM serves as the quintessential example of surreptitious rule making. Three years after deferring its rulemaking function to the Access Board (while still "actively participating" as a member of the Board) and allowing the Access Board to field and respond to all comments regarding lines of sight, and 10 years before the Access Board would finally get around to fully considering the standing spectator problem and enacting a pertinent, APA-compliant regulation, the DOJ subtly imposed a new construction/renovation standard for dozens of multi-million dollar sports and recreational facilities nationwide without the slightest input from the various affected commercial industries or the hundreds of millions of patrons they serve.

CONCLUSION

While historically unregulated interests might be tempted to suggest that the Access Board's 2004 adoption of a guideline specifically addressing the issue of standing spectators and the DOJ's imminent enactment of that same regulation prospectively render the Ninth Circuit's error "no harm, no foul," the problem inherent in the DOJ's issuance of the 1994 TAM is considerably broader in scope. Courts continuously struggle with the APA-created dichotomy between legislative rules and interpretive manuals or guides, and their opinions point despairingly and oftentimes simultaneously in multiple directions when offering judicial guidance. Certainly, the DOJ had not gotten whatever "message" there was to be had when it unilaterally issued the 1994 TAM and declared a new way to implement the ADA's statutory mandates.

The Court has the opportunity to resolve an unquestionable split among the circuit courts of appeal with respect to the effect of the 1994 TAM, and in so doing, provide clearer guidance to the agencies and the constituents they govern through their rulemaking. Speedway Sonoma respectfully urges the Court to avail itself of this opportunity and accept jurisdiction.

Respectfully submitted,

EDWARD G. GUEDES
Counsel of Record
JULISSA RODRIGUEZ
ROBERT S. FINE
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Counsel for Amicus Curiae